Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
FIBER TECHNOLOGIES NETWORKS, L.L.C.	)	
	)	WC Docket No. 03-37
Petition for Preemption Pursuant to Section 253 of the Communications Act of Discriminatory Ordinance, Fees and Right-of-Way Practices of the Borough of Blawnox, Pennsylvania	)	

REPLY COMMENTS

OF

FIBER TECHNOLOGIES NETWORKS, L.L.C.

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SUMMARY

The Ordinance has the effect of prohibiting the provision of competitive services. The Borough's argument that Section 253(a) is not violated by the Ordinance because Fibertech can either stay out of Blawnox or buy private land rights and construct new pole routes underscores the need for Commission preemption of the Ordinance.

Section 253(b) provides no safe harbor for the Ordinance, because in Pennsylvania the State PUC (not a municipality) has the authority to promulgate regulations to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Blawnox has provided no information that would suggest that the Ordinance falls under 253(b) protection.

The Ordinance is not protected under § 253(c) because it is not related to any legitimate rights of way management, the $13,200.00 per mile fee does not constitute fair and reasonable compensation, and the Ordinance is not applied in a non-discriminatory and competitively neutral manner.

While determination of state law issues is not required for the Commission to preempt the Ordinance, these issues do cast doubt on whether Blawnox can assert any legitimate right of way management interests in the State highway rights of way.

In executing its responsibilities under §§ 253(a) and 253(d), the Commission has the authority to decide the merits of any safe harbor claims raised. Neither a formal rulemaking, nor a formal hearing is required for the resolution of this matter.

Thus, the Ordinance should therefore be preempted under 47 U.S.C. § 253(d) as an unlawful barrier to competition.

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Fibertech filed its Petition initiating this proceeding on January 30, 2003. The gravemen of Fibertech's Petition is that the Borough of Blawnox, Pennsylvania, has created a barrier to market entry by Fibertech as a competitive carrier.

The Borough's Ordinance violates Section 253(a) and flies in the face of the Commission's New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers (the "New Unbundling Rules"), which the Commission released subsequent to the filing of Fibertech's Petition, on February 20, 2003. Section 253 provides a critical foundation for the New Unbundling Rules, which both encourage and also depend upon the deployment of competitive broadband facilities. Fibertech believes that ***there are two main types of barriers threatening the achievement of the Commission's objective***:

- **Access to Municipal Rights of Ways; and**
- **Access to Utility Poles and Conduits**

Unless these real barriers to competitive networks are forcefully addressed, the New Unbundling Rules could fail in their purpose of stimulating increased facilities-based competition, and might instead be the death-knell for competition – resulting in a new era of monopoly control over the

local telecommunications market. *If new entrants are to be denied access to new fiber facilities deployed by ILECs, new entrants must be allowed to build facilities without undue delay or expense in order to survive.*

The many and varied anti-competitive schemes employed by certain ILECs and other owners of monopoly bottleneck facilities to deny competitive service providers access to poles and conduits are beyond the scope of this proceeding. However, the instant Petition involving Blawnox's violative conduct does offer the Commission the opportunity to address barriers against competitive access to rights of ways.

Therefore, Fiber Technologies Networks, L.L.C. ("Fibertech"), Petitioner in the above-captioned matter, hereby respectfully submits its Reply Comments for the Commission's consideration. As set forth fully below, the comments in this proceeding in opposition to Fibertech's Petition are unpersuasive; the Commission should grant Fibertech's Petition as promptly as possible.

I. SECTION 253 ANALYSIS

A. The Ordinance Violates Section 253(a)

1. The Borough's attempt to minimalize the prohibitory effects that the Ordinance produces actually underscores the need for preemption by the Commission. The Borough's comments basically present Fibertech with two alternatives: (1) stay out of Blawnox; or (2) buy private land rights.[1] While staying out of Blawnox obviously prohibits the development of Fibertech's competitive facilities in Blawnox, so too does the prospect of having to negotiate agreements with (and pay money to) every private landowner along a given route and construct an entirely new set of poles and conduits – especially when ILECs are able to use existing

facilities in the public rights of way at no cost. For the reasons set forth in Fibertech's Petition, as well as those adeptly expounded upon by the other Comments in support of Fibertech's Petition, the Commission should find that the Ordinance violates Section 253(a).

B. The Ordinance is Not Protected by the Safe Harbor Provisions of Section 253(b) of the 1996 Telecommunications Act

2. While Blawnox asserts that the Ordinance is saved by the Section 253(b) safe harbor, Blawnox does nothing more than recite the language of the statute and assert that it does apply[2] Blawnox does not provide any supporting documentation, nor does it even provide any facts or other argument, supporting its assertion that the preemption of the Ordinance would prevent the *State* from advancing universal service, protecting the public safety and welfare, ensuring the continued quality of telecommunications services, and safeguarding the rights of consumers. This safe harbor simply does not apply to an Ordinance issued by a Pennsylvania municipality (because the State PUC retains the authority for such issues), and even if it did, Blawnox has failed to demonstrate that the barrier to entry created by its Ordinance is somehow protected by the 253(b) safe harbor.

C. The Ordinance Is Not Protected by the Safe Harbor Provisions of Section 253(c) of the 1996 Telecommunications Act Because the Ordinance Goes Beyond Rights of Way Management

3. The Borough of Blawnox argues that the Ordinance in question does not violate Section 253(a) of the 1996 Telecommunications Act, in part, because "[i]n instances where the [telecommunications] service is not under the umbrella of [Pennsylvania Public Utility Commission] regulations, the Borough can exercise *regulatory control over the*

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1 *See Blawnox Comments*, at 9.
2 *See Blawnox Comments*, at 10.

[telecommunications] service in order to manage the rights of way in the Borough."[3] The Borough maintains that since Fibertech's tariff contains Individual Case Basis ("ICB") pricing in certain situations, Fibertech "converts itself (for that service) to a private utility, removing itself from the jurisdiction of the Pennsylvania Public Utility Commission."[4]

4. Assuming, *arguendo*, that the Borough is correct in asserting that Fibertech, by offering ICB pricing, has converted itself to a private carrier—a conclusion that is suspect, at best—and that the ICB priced services are outside the jurisdiction of the Pennsylvania Public Utilities Commission, the Borough's interpretation of its jurisdictional reach, nonetheless defies common sense and sound public policy. Contrary to what Blawnox might wish to suggest, it cannot separate its attempted regulation of "private carrier" services from the ensuing municipal regulation of services clearly within the regulatory ambit of the Public Utility Commission: a fee premised upon the offering of an unregulated service that prevents a provider from maintaining facilities within the municipality also has the result, by precluding construction of facilities, of prohibiting the provider from offering any other facilities-based service, no matter how closely it may be regulated by the State.

5. Case law interpreting the extent of municipal authority under Section 253 of the 1996 Telecommunications Act clearly supports a conclusion that the Borough may not shoe-horn its way into the regulation of telecommunications by attempting to identify a non-regulated service offered by a provider. As stated recently by the United States District Court for the Northern District of New York in City of Rome, New York v. Verizon Communications,[5]

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[3] *Blawnox Comments*, at 7 (emphasis supplied).

[4] *See* Letter from Frederick A. Polner, Attorney for the Borough of Blawnox, to Robert Witthauer, Deputy General Counsel, Fibertech Networks 3 (Dec. 12, 2002) (Attachment H to Fibertech's Petition).

[5] City of Rome, New York v. Verizon Communications, Inc., 240 F. Supp. 2d 176 (N.D.N.Y. 2003).

"Section 253 permits municipalities to manage rights of way; not regulate telecommunications."[6] The Court in City of Rome explained further: "[S]ubsection [253(c)] permits local governments to impose legal requirements upon telecommunications providers in two limited circumstances: (1) to manage the public rights of way; and (2) to require fair and reasonable compensation from telecommunications providers on [sic] a nondiscriminatory and competitively neutral manner."[7] Because localities are limited to managing the *rights of way*, not *telecommunications services*, the scope of municipal authority under Section 253(c) does not vary with the type of services the carrier is providing. Localities may not use their rights of way authority to seize general regulatory control over telecommunications services providers,[8] nor may municipalities, in the exercise of their rights of way authority, regulate similar telecommunications facilities differently based solely upon the type of services provided.

6. In Qwest Communications v. City of Berkeley,[9] the City of Berkeley made an argument similar to that made by Blawnox, which the United States District Court for the Northern District of California has now flatly rejected. Berkeley argued that Qwest could be required to pay compensation for use of the public rights of way, despite a state law that prohibited imposing such fees on telecommunications carriers, on the ground that Qwest was not providing common carrier services. The City asserted that Qwest was not providing service within the City as a common carrier because: (i) Qwest had not disclosed the rates, terms and

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6 *Id.* at 179; *see also,* TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 81 (2d Cir. 2002).

7 City of Rome, 240 F. Supp. 2d at 178.

8 *See* XO Missouri, Inc and SWBT v. City of Maryland Heights, 2003 WL 1838767, No. 4:99-CV-1052 CEJ, at 15 (E.D.Mo. Feb. 5, 2003); City of Rome, 240 F. Supp. 2d at 179; City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175, 1178 (9th Cir. 2001); AT&T Comm's v. City of Dallas, 8 F. Supp. 2d 582, 591 (N.D.Tex. 1998).

9 Qwest Communications v. City of Berkeley, California, 2003 WL 1857631, No. C 01-00663 SI, at 8 (N.D.Cal. Apr. 7, 2003).

services of the customer's contract; and (ii) facts available to the City indicated that the contract was not a common carrier service offering.[10] The Court rejected the City's analysis, finding that:

> . . . it is not the arena of the City of Berkeley to determine the common carrier status of Qwest or any other communications provider. Section 253 allows the federal government and the states to regulate the telecommunications industry, *which would include the common carrier status of the communications providers*. Section 253(c) allows municipalities to regulate the rights of way, but [the challenged Ordinance] goes far beyond the regulation of rights of way, and allows the City of Berkeley to make determinations that are the province of the federal and state governments.[11]

7. Similarly, the Borough of Blawnox's Ordinance does not survive scrutiny under Section 253(c) because it, too, requires the Borough to determine the common carrier status of a provider in order to assess the rights of way use fees.[12] As the Court ruled in the City of Berkeley, such a determination is not within the purview of municipalities.[13]

8. The Borough of Blawnox relies on the same flawed reasoning as did Berkeley in arguing that the Ordinance falls within the safe harbor of Section 253(c) of the 1996 Telecommunications Act. The Borough reasons that "[w]here the PUC does not have jurisdiction and control by virtue of a particular telecommunications service converting itself to a private utility service, the Borough of Blawnox can necessarily exercise its broad police powers over such service, in order to effectively manage the public rights of ways [sic]."[14] However, whether or not the Borough's regulatory analysis regarding the nature of Fibertech's service offering is correct[15]— which it is not—the analysis does not provide a legal basis for the Borough to exercise its police powers over Fibertech's telecommunications facilities in a

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10 *See id.*
11 *Id.* at 8-9 (emphasis added).
12 *See Blawnox Comments*, at 6-7; 11-12; 18-20.
13 *See* City of Berkeley, No. C 01-00663 SI at 8-9.
14 *Blawnox Comments*, at 11-12.
15 *Blawnox Comments*, at 11-12.

discriminatory manner. As the court held in the City of Berkeley, a locality, such as the Borough, lacks the jurisdiction even to make a determination concerning the common carrier status of Fibertech.[16] Under the safe harbor of Section 253(c), the Borough is limited to adopting regulations that "manage the public rights of way,"[17] which means "control over the right-of-way itself, not control over companies with facilities in the right-of-way."[18] In revealing that the Ordinance's purpose is to allow "the Borough of Blawnox to regulate service providers in instances where the PUC does not,"[19] the Borough admits that the Ordinance runs afoul of Section 253(c), in that it exceeds the municipality's authority which is limited to "manag[ing] the public rights of way."[20] The City of Berkeley case makes clear that an ordinance which categorizes telecommunications carriers according to the telecommunications services provided falls outside the safe harbor granted to localities pursuant to Section 253(c) of the 1996 Telecommunications Act.[21]

D. The Ordinance Does Not Meet the Safe Harbor Requirement of Fair and Reasonable Compensation

9. It is important to note that the Borough fails to reference any cost studies or other evidence supporting the $13,200 per mile recurring annual fee for aerial facilities, *nor does it even assert that this fee is in any way related to actual costs to the Borough.* The Commission should therefore infer that the fee has no relationship to costs incurred (if any) by Blawnox.

10. The Borough of Blawnox does not attempt to tie the fee assessed by the Ordinance to costs incurred by the Borough, for purposes of establishing that the fee assessed is

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16 *See* City of Berkeley, No. C 01-00663 SI at 8-9.
17 47 U.S.C. 253(c).
18 XO Missouri, No. 4:99-CV-1052 CEJ at 13; *see also* City of Berkeley, No. C 01-00663 SI at 6; City of Auburn, 260 F.3d at 1175.
19 *Blawnox Comments*, at 12.
20 47 U.S.C. 253(c).

"fair and reasonable" pursuant to Section 253(c) of the 1996 Telecommunications Act. Rather, the Borough asserts that courts have adopted two different analytical models for determining whether fees are considered "fair and reasonable" under 253(c)—the "cost-recovery-model" and the "totality-of-the-circumstances" test—and urges that the latter test be applied here.[22] Recognizing, presumably, that a fee of $2.50 per lineal foot has no possibility of surviving scrutiny under a "cost-recovery-model," the Borough argues that the "totality-of-the-circumstances" test furthers Congressional intent and would harmonize Tenth Amendment jurisprudence.[23] The Borough of Blawnox further asserts, without support, that scrutinizing the Ordinance "under the 'cost-recovery-model' would . . . require a narrowing of the local government's ability to effectively manage public rights of way."[24]

11. Instead, in its comments, Blawnox cites to the Borough's desirable location, the availability of private rights of way and rights of ways in other localities, and the fees assessed by localities in completely different geographic areas (no mention is made of other Pennsylvania municipalities) to support its conclusion that the $2.50 per lineal foot fee is "fair and reasonable compensation."[25] But, as the United States District Court for the Eastern District of Missouri recently held, unless there are cost studies or evidence concerning actual costs incurred by a locality that demonstrate the fee imposed by an ordinance is reasonably related to the costs of maintaining the locality's rights of way, a per lineal foot fee (in that case, $1.74 per foot) cannot be deemed "fair and reasonable compensation" under the safe harbor provision of Section

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21 *See* City of Berkeley, No. C 01-00663 SI at 6-7; City of Auburn, 260 F.3d at 1176.
22 *See Blawnox Comments*, at 12-13.
23 *See Blawnox Comments*, at 13.
24 *Blawnox Comments*, at 13.
25 *See Blawnox Comments*, at 14 and 14 n.20.

253(c),[26] irrespective of the factors Blawnox cites. In the recent Missouri case, XO Missouri and SWBT v. City of Maryland Heights, Missouri, the City argued, as does the Borough of Blawnox in this case, that its fee should be found presumptively reasonable based upon the per lineal foot fee charged by another city. The Court rejected that argument, recognizing that local variables can impact the amount that might be deemed "fair and reasonable compensation." The variables cited by the Court in the XO Missouri case, however, relate to actual costs, not to the subjective factors, such as desirable location and the availability of private rights of way, cited by Blawnox:

> The variables that can serve to impact costs include the age of the right-of-way, the usage by all utility companies, the access to the rights of way and the frequency of that access by all utility companies, and the quality of construction of the right-of-way.[27]

Blawnox has failed to meet its burden to show that its $2.50 per lineal foot fee correlates to actual cost based upon these types of factors.

12. The Court in XO Missouri followed a long line of cases applying the "fair and reasonable compensation" provision in Section 253(c). Many courts have held that fees charged by municipalities must be directly related to a company's use of the local rights of way, otherwise the fees constitute an unlawful economic barrier to entry.[28] Still other courts have invalidated revenue-based fees reasoning that such fees are not "fair and reasonable compensation" because they do not provide compensation based on the use of the rights of way.[29] Additionally, this Commission has determined that fees not related to the costs incurred

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[26] *See* XO Missouri, No. 4:99-CV-1052 CEJ at 10-12 .

[27] *Id.* at 8-9.

[28] *See id.*; *see also* City of Dallas, 8 F.Supp 2d. at 593; Bell Atlantic-Maryland v. Prince George's County, 49 F.Supp.2d 805, 817 (D. Md. 1999).

[29] *See* New Jersey Payphone Assoc., Inc. v. Town of West New York, 130 F.Supp.2d 631, 638 (D. N.J. 2001); PECO Energy Co. v. Township of Haverford, No. Civ. A. 99-4766, 1999 WL 1240941 at *8 (E.D. P.A. Dec. 20, 1999).

by the local government are prohibited by the 1996 Telecommunications Act.[30] Having considered these precedents, the Court in the XO Missouri case held:

> To meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights of way. In reaching this conclusion, the Court is persuaded by the legislative history of the [1996 Telecommunications Act], as well as the de-regulation concept in the [1996 Telecommunications Act] as a whole, since plainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.[31]

Under this standard, it is clear that a per linear foot feet fee that results in requiring a telecommunications provider to pay an annual amount that almost equals its construction cost *on a recurring annual basis* is not "fair and reasonable compensation" under Section 253(c). By failing to establish that the per linear foot fee imposed by the ordinance is related to any valid cost study or actual costs incurred in maintaining its rights of way, Blawnox effectively concedes that the Ordinance is unprotected by the safe harbor provision of Section 253(c).

E. The Ordinance Does Not Come Within the Safe Harbor Because It Is Not Non-Discriminatory and Competitively Neutral.

13. It is important to note that while the Borough makes vague assertions that the Ordinance could apply to ILECs, it does not supply copies of any invoices sent to (or payments received from) any ILEC, *nor does Blawnox even assert that the Borough has attempted to seek such a payment from any ILEC.* The Commission should therefore infer that Blawnox has only targeted competitive service providers for these fees.

14. The application of the Ordinance is discriminatory in that it could only apply to competitive providers of telecommunications services. Throughout the Borough of Blawnox's

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30 *See New England Public Communications Petition for Preemption*, 11 FCC Rcd 19,713, 19721-22 (1996).

Comments, the Borough proclaims that the Ordinance applies to ILECs. However, the Borough has determined that ILECs do not have to pay the fees set out in the Ordinance because they have presumably satisfied the criteria contained in the Ordinance. It is entirely unclear how the Borough has come to the conclusion that Fibertech's service offering fails to satisfy the prerequisites set out in the Ordinance, while ILECs pass. The Borough of Blawnox claims that by allowing for ICB pricing in certain instances, Fibertech's telecommunications service offering has spontaneously mutated into a telecommunications service offering of a private carrier for purposes of that particular service. However, ICB language is also contained in ILEC tariffs. Thus, the legal reasoning underlying the application of the Ordinance is flawed and its interpretation is discriminatory since only competitive carriers are found subject to its terms. In reserving unfettered discretion as to which carriers are subject to the Ordinance, the Borough of Blawnox fails to satisfy the mandates of Section 253 of the 1996 Telecommunications Act.

II. STATE LAW ISSUES

15. Blawnox asserts that the question of "whether or not the Ordinance is lawful under the laws of the State of Pennsylvania, is wholly irrelevant."[32] While the state law issues are possibly relevant to whether Blawnox really has any "management" interest in the rights of ways at issue, Fibertech agrees that resolution of the state law issues is not necessary in order for the Commission to determine that the Ordinance should be preempted.

16. For clarification, however, Fibertech will briefly address the assertions by Blawnox that the Ordinance is valid under state law. Initially, it is worth noting that Blawnox

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31 XO Missouri, No. 4:99-CV-1052 CEJ at 10.

32 *Blawnox Comments* at 17.

does not deny that the Fibertech facilities that Blawnox is attempting to assess a fee against are within the right of way of the state highway.

17. Although Blawnox attempts to distinguish itself from the ruling in Pennsylvania Power by implying that the Pennsylvania Power case only dealt with the placement of poles, the Ordinance invalidated in Pennsylvania Power also pertained to "lines, wires, cables thereon carried"[33] and further, the statute that was the object of the court's analysis gives the State highway department authority over "telephone, telegraph, or electric light or power poles, *or other structures*, [to] be erected upon, *over*, or in any portion of a State highway . . . [or] opening[s] . . . made therein"[34] A review of the language of Blawnox's Ordinance makes it clear that Blawnox is attempting to regulate "any tangible component" in the public rights of way.[35] That Fibertech's fiber optic cable and support strand are structures over the State highway is clear, and thus the Ordinance, like the ordinance at issue in Pennsylvania Power, is null and void.

18. Also, the Borough's implication in its Comments that it is not trying to regulate the construction of poles in the public right-of-way, just communications facilities, casts serious doubt over the sincerity of its "right of way management" argument. In this proceeding Blawnox now apparently takes the position that it does not try to manage the installation of any type of facilities related to tariffed services, nor does it manage the installation of heavy telephone poles in the public rights of way for tariffed or non-tariffed services, but Blawnox would seek to have the Commission believe nevertheless that it is concern over management of the public ways that causes the Borough to seek a per-foot charge against competitive fiber optic facilities on poles above the State highway. This simply lacks credibility.

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33 Pennsylvania Power & Light Co., v. Mahanoy Township, 33 Pa. D. & C.2d 268, 269 (1963).

34 36 P.S. § 670-411 (emphasis added).

19. Further, the Borough's attempt to escape the application of the Bell Telephone[36] case to Blawnox is undermined by its citation to cases that pre-date the Pennsylvania PUC's existence or which are simply outdated due to subsequent case law[37] recognizing the PUC's proper role.

20. As stated above, however, Fibertech does not believe that the Commission is required to analyze the Ordinance under state law. Information regarding state law, however, does provide further evidence that the Ordinance is not a rights of way management measure covered by any safe harbor provision of Section 253.

III. JURISDICTIONAL AND PROCEDURAL ISSUES

A. Jurisdiction of the Commission

21. Other Comments in support of Fibertech's Petition have fully and adequately addressed the jurisdictional issues raised by NATOA and the Borough. Therefore Fibertech will not duplicate those comments here. Fibertech believes it would be contrary to logic and the purpose of Section 253 if the Commission, in carrying out its obligations under Section 253(a) and (d), did not have the authority to decide the merits of a defense raised under Section 253(c). Also, while Fibertech recognizes value in the idea of a separate cause of action under Section 253(c), Fibertech believes that the Borough's Ordinance clearly runs afoul of Section 253(a) and thus must be preempted regardless of whether a separate cause of action exists under Section 253(c).

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35 *See* Ordinance at 1, §1.1(F). *See also* Ordinance at 3, §1.1(Q) and §2.1.

36 Bell Telephone Co of Pennsylvania v. Bristol Township, 54 Pa. D. & C.2d 419 (1971).

37 *See generally* Duquesne Light Co. v. Upper St. Clair Tp., 105 A.2d 287, 291 (Pa. 1954).

B. Formal Rulemaking Under The APA Is Not Required To Resolve Fibertech's Section 253 Complaint

22. NATOA argues that the Commission should not make any determination as to whether the per-linear-foot fee imposed by the Borough of Blawnox for use of its rights of way is "fair and reasonable" compensation under Section 253(c) of the 1996 Telecommunications Act.[38] NATOA maintains that, if the Commission did choose to address this issue, "it must provide separate notice and consider the issue in a broader proceeding."[39] NATOA contends that if the Commission were to define the term "fair and reasonable compensation," the Commission would be exercising its legislative power resulting in a future effect and triggering the notice requirement of the Administrative Procedure Act ("APA").[40] NATOA also asserts that when an agency "changes the rules of the game," formal notice must be provided in the Federal Register.[41]

23. NATOA apparently misconstrues the nature of this proceeding. Fibertech's petition in this matter requests the Commission to preempt the Borough's Ordinance under Section 253(d) of the Communications Act. To exercise its authority under Section 253, the Commission must determine, among other matters, whether the fee imposed by the Ordinance comes within the "safe harbor" provided by Section 253(c), in which Congress preserved local governments' authority to require "fair and reasonable compensation" for rights of way use. Congress, in Section 253, did not direct the Commission to conduct either a formal rulemaking or a formal adjudication to determine what amount municipalities may charge for the use of their rights of way, nor is rulemaking required. Rather, Congress itself defined the permissible

38 *See NATOA's Comments*, at 11.
39 *NATOA's Comments*, at 12.
40 *See NATOA's Comments*, at 12.
41 *NATOA's Comments*, at 12.

compensation: it is such amount as is "fair and reasonable." The Commission need only decide whether, on the specific facts presented, the Blawnox Ordinance does or does not meet the "fair and reasonable" standard that Congress legislated. The formal rulemaking procedures and cases under the APA cited by NATOA in its Comments are wholly inapposite.

24. To decide Fibertech's petition, the Commission simply must apply the law enacted by Congress to the facts of this case to determine whether it is consistent with the "fair and reasonable compensation" standard for an ordinance to require that a provider pay, on a recurring annual basis, close to one-hundred percent (100%) of the original construction costs for the presence of a single cable on pre-existing, utility-owned poles on rights of way administered by the State Highway Department.[42] Formal rulemaking, in contrast, as NATOA illustrates through the cases it cites, involves agency legislation.

25. NATOA's reliance on White v. Shalala,[43] in support of its contention that the Commission is required to follow the APA's rulemaking procedures to determine whether the Blawnox Ordinance in preempted by Section 253, is misplaced. Relying on an out-of-context quotation from White v. Shalala, NATOA argues that the Commission would be engaging in a legislative activity, rather than interpreting a statute, if it were to define "fair and reasonable compensation."[44] But the Commission is not being asked to do either. Rather, as discussed above, this proceeding merely requires the Commission, to apply the "fair and reasonable compensation" standard legislated by Congress to the particular facts of this case.

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42 *See Fibertech Petition*, at 11.
43 7 F.3d 296 (D.C. Cir. 2002)
44 *See NATOA's Comments*, at 12.

26. Indeed, NATOA's bare assertion that when an agency "changes the rules of the game" formal notice must be provided[45] is confused. In Sprint v. FCC[46], the case cited by NATOA, the United States Court of Appeals for the District of Columbia found that the Commission was required to follow the dictates of the rulemaking procedures in the APA, because the rule adopted by the Commission repudiated or was irreconcilable with the existing rule.[47] In such instances, the Commission acts in a quasi-legislative manner whereby the APA's rulemaking procedures must be followed. In this case, in contrast, there are no existing rules, nor is it incumbent upon the Commission to promulgate rules to resolve the issue of whether Section 253(c) provides the Blawnox Ordinance with safe harbor. NATOA admits that the Commission has "never formally ruled on the scope of 'fair and reasonable compensation'" contained in Section 253(c). This is quite logical. Congress did not direct the Commission to make rules that define the exact dollar figure, or even a formula for calculating the amount, that constitutes "fair and reasonable compensation" for rights of way use. Moreover, even assuming that the Commission has discretion to make rules governing the manner in which "fair and reasonable compensation" is to be determined, nothing in Section 253 precludes the Commission from a case-by-case determination of that issue. Since the Commission has never ruled on the scope of the statutory "fair and reasonable" standard, then there is no change to (non-existent) rules and no requirement to follow the APA's formal rulemaking procedures. For these reasons, the Commission may grant Fibertech's Petition without adhering to the APA's formal rulemaking procedures.

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45 *See NATOA's Comments*, at 12.

46 Sprint Corp. v. Federal Communications Commission, 315 F.3d 369 (D.C. Cir. 2003).

47 *See* Sprint Corp. at 374.

C. Preempting the Borough of Blawnox's Ordinance Based on the Comments Is Consistent with the APA, and No Formal Hearing Is Required

27. In its Reply Comments, the Borough argues that, if the Commission preempts the Borough's rights of way ordinance in this proceeding, the Commission would violate the APA.[48] The Borough seems to be claiming that, because it has not had the ability to "cross-examine, probe or test [Fibertech's] allegations, contentions and assertions," presumably in a formal hearing of some sort, its "fundamental rights of fairness and due process" have been violated.[49] However, the Borough cites no legal authority in support of its contention. Moreover, as shown below, actual analysis of the APA and controlling case law demonstrates the fallacy of the Borough's argument.

28. Since at least 1978, the Supreme Court has made clear that agencies are free to establish their own administrative procedures, subject only to the express requirements of the enabling statute or the APA.[50] In the Vermont Yankee case, the Supreme Court cited to a case involving the Commission's discretion in establishing agency procedures when it held:

> [T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[51]

In stating that the rulemaking provisions of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures," the Court explained:

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[48] *See Borough of Blawnox Reply Comments*, at 3. Notably, the Borough of Blawnox simply provides a general cite to the APA leaving it to the Commission and interested parties to determine on what portion of the APA the Borough relies.

[49] *Id.*

[50] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544, 560 (1978).

> Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In FCC v. Schreiber, 381 U.S. 279, 290, 85 S.Ct. 1459, 1467, 14 L.Ed.2d 383 (1965), the Court explicated this principle, describing it as "an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."[52]

29. These principles of agency discretion over the conduct of proceedings within the Commission's statutory purview were affirmed by the United States Court of Appeals for the District of Columbia in the Global Crossing v. FCC case, in which the Court upheld the challenged aspect of the Commission's procedure for determining payphone compensation complaints.[53] There, the Court explained:

> It is well-settled that the Commission "enjoys wide discretion in fashioning its own procedures." City of Angels Broad., Inc. v. FCC, 745 F.2d 656, 664 (D.C.Cir.1984). Section 208 authorizes the FCC to investigate a complaint "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208. More generally, 47 U.S.C. § 154(j) provides that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Although Global Crossing contends that designation of an issue as part of an affirmative case rather than as an affirmative defense is a matter of substance, not procedure, we disagree. The Supreme Court has interpreted § 154(j) "as explicitly and by implication delegating to the Commission power to resolve subordinate questions of procedure such as the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." FCC v. Schreiber, 381 U.S. 279, 289, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965) (internal quotations omitted).[54]

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51 *Id.* at 543-544 (citing FCC v. Schrieber, 381 U.S. 279, 290 (1965), quoting FCC v. Pottsville B'casting Co., 309 U.S. 134, 143 (1940)).

52 *Id.* at 524-525.

53 Global Crossing Telecommunications, Inc. v. FCC, 259 F.3d 740 (D.C. Cir. 2001)

54 *Id.* at 748.

30. Here, Section 253(d) does not stipulate a particular procedure the Commission must follow in determining a petition for preemption, but rather delegates to the Commission broad general authority. Similarly, the APA only requires formal proceedings, such as a hearing, when a statute expressly provides for a formal adjudication or formal rulemaking with an opportunity for an agency hearing.[55] Accordingly, the Commission is not required to provide formal, quasi-judicial procedures in order to resolve Fibertech's petition, and may proceed in accordance with the procedures it has fashioned for resolving Section 253 complaints.

CONCLUSION

Based upon the foregoing, Fibertech's original Petition in this matter, and the Comments and Reply Comments by other parties in support of Fibertech's Petition, Fibertech respectfully requests that the Commission remove this barrier to facilities-based competition by granting the relief requested in Fibertech's Petition.

Respectfully submitted,

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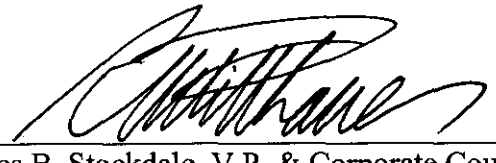

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[55] *See* APA §§ 553(c), 554(a), 556(a), 557(a).

CERTIFICATE OF SERVICE

I hereby certify that on April 29th, 2003, I served a copy of the foregoing on the persons listed below by depositing a copy of same in the U.S. Mail, with first class postage paid to the persons listed below).

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